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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931

NO. 433

WILLIAM E. LAMB, Petitioner

vs.

WILLIAM A. SCHMITT, RECEIVER, Respondent

STATEMENT OF FACTS AND BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

GREEN, GREEN & JACKSON,
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MAYNARD, FITZGERALD & VENABLE,
of Counsel.

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STATEMENT OF FACTS AND BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

This cause, No. 433 on the docket of this court, is a companion case to No. 432 on the same docket, and reference to No. 432, its records, briefs, and proceedings, is here made for a fuller understanding hereof.

The opinion of the district court is reported in 43 Fed. (2nd) 770, (Rec. 156).

The opinion of the Circuit Court of Appeals for the Fifth Circuit was rendered on April 9, 1931, and is reported in 48 Fed. (2nd), 533. (Rec. 169).

I

JURISDICTION

The right of the petitioner to writ of certiorari from this court to review the decision of the Circuit Court of Appeals below is respectfully challenged on the following grounds:

1. The decision of the court below is not a final decision.

2. There is no special or important reason for the granting of the writ of certiorari asked for herein.

3. The writ of certiorari asked for here is not one to review a decision of the Circuit Court of Appeals, (a) where said decision is in conflict with the decision of another Circuit Court of Appeals on the same matter; or (b) where it has decided an important question of local law in a way probably in conflict with applicable local decisions; or (c) where it has decided an important question of general law in a way probably untenable or in conflict with the weight of authority; or (d) where it has decided an important question of federal law which has not been, but should be, settled by this court; or (e) where it has decided a federal question in a way probably in conflict with applicable decisions of this court; or (f) where it has so far departed from the accepted and usual course of judicial proceeding, or so far sanctioned such a departure by a lower court as to call for an exercise of this court's power of supervision.

4. The writ of certiorari asked for herein is not one which will be granted under the terms of Section 347, Title 28, U. S. Code.

II.

STATEMENT OF FACTS

The original bill, (Rec. Pg. 1) in this cause being No. 162 in Equity in the district court below, was filed as a bill, ancillary to cause No. 129 in Equity, in the same court. (See original bill No. 129 in Equity. Rec. Pg. 7-64, and supplemental bill therein. (Rec. 64-78).

The original bill in Cause No. 129 and supplemental bill therein just cited, sought to set aside alleged fraudulent conveyances, and plaintiffs claimed a lien by virtue of the state statute and the rule in equity cases in federal courts, on all the funds involved and described in the original bill, No. 129.

During the trial of the original case in equity, No. 129, in the lower court, it was discovered that petitioner, who was at that time attorney for the defendants in said cause No. 129, had, since the filing of the suit and during the pendency thereof, and with full knowledge of the equities, taken out of the corpus of the estate on which a lien was claimed, approximately $90,000.00 of the funds. Thereupon the plaintiffs in said original cause No. 129 in Equity, filed an ancillary petition in Cause No. 129 (Rec. 99-104) seeking summary action as against petitioner here (a) for a turn over and to set aside such additional fraudulent conveyances; (b) as for contempt; (c) to enjoin further additional transfers. An order was entered (Rec. 104) making petitioner a party to cause No. 129 and ordering service thereof on petitioner as (a) rule to show cause as for contempt; (b) rule to show cause for a turn over; (c) giving notice of a temporary restraining order. Petitioner answered the ancillary petition in cause No. 129 (Rec. 116) in all of its prayers and prayed for complete exoneration. (Rec. 136).

A decree was entered in the original cause No. 129 (Rec. 78-94) which decree reserved to the district court (Rec. 81):

"Full jurisdiction of this cause to make such other and further orders as it may deem proper, and as equity may require, both as to increasing the amount of the estate, and/or increasing the amount due and owing to any party plaintiff, and/or uncovering additional property and disposing of any adverse claims that may be interposed as against any portion of said estate." And further: (Rec. 86)

"This court reserves full jurisdiction of the cause to make any other and further orders which may be, from time to time, essential for the creation, preservation, and/or disposition of the relative rights of the several parties hereto; or any claimant of any portion of the estate, now or hereafter created."

It will be seen that the petitioner was then a party to the cause No. 129 when decree was entered April 30, 1930 (Rec. 94). By the terms of said decree a receiver was appointed (Rec. 80) and the "said receiver" given the rights as follows: (Rec. 92):

"Said receiver is hereby invested with full power and authority to institute and/or prosecute in any court of proper jurisdiction, at law or in equity, any suit or proceedings against any and all persons whomsoever seeking to recover posession and/or control and/or damages in connection with the rights hereby vested in him."

Thereupon the receiver filed the original bill here, (Rec. Pg. 1) as an ancillary bill to cause No. 129. This being done, as we believe, as a precautionary measure and, to strengthen, if such was needed, the ancillary petition already filed in cause No. 129 (Rec. 99) as above cited. Subpoena was thereupon issued (Rec. 94) and served on the petitioner and returned. Whereupon the petitioner came into court and moved (Rec. 96) "to quash the attempted service of process on him." The said motion (Rec. 96-99) was composed of five paragraphs, but

set up the sole ground for the motion to quash as being that the petitioner when served was a non-resident attorney attending court in a foreign jurisdiction, and, therefore, exempt from service of any such writ. The motion came on to be heard before the district court and after hearing the evidence showing the surrounding facts and circumstances, the district court, by final decree, (Rec. 155) quashed the service of process. The opinion of the district judge appears at pages 156-160 of the Record. Thereupon an appeal was taken by the receiver to the Circuit Court of Appeals for the Fifth Circuit where the district court was reversed (Rec. 176) and Judge Dawkins delivered the opinion of the court, which is found at Pages 169-175 of the Record. The sole question of appeal was whether or not petitioner Lamb, who was admittedly a non-resident attorney attending court in a foreign jurisdiction, was subjest to service of such a writ.

III

REASONS RELIED UPON IN OPPOSITION TO THE ISSUANCE OF THE WRIT

Upon reading the statement of facts herein involved, as set forth in II, **supra**, it will be seen that the reasons relied upon for the allowance of the writ, as set forth under subdivision B of the petition for the writ in Paragraphs 1, 2, 3 and 4 thereof, are not good and valid reasons for the issuance of the writ:

1. Because the decision of the Circuit Court of Appeals of the Fifth Circuit is not in conflict with the decision of this court in the following cases cited by petitioner, namely:

Page Co vs. McDonald, 261 U. S. 446.

Stewart vs. Ramsey, 242 U. S. 128.

Nor is it in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit cited by counsel, namely:

Durst vs. Tautges, Et Al, 44 Fed. (2nd) 507.

2. While it is true that unless the court issues its writ of certiorari at this time, petitioner will be required to stand trial in the district court below, nevertheless he will not be finally deprived of any immunity since the decision of the Circuit Court of Appeals in this cause is not a final decision as to petitioner and petitioner yet has the right (a) to stand trial in the district court; (b) to appeal to the Circuit Court of Appeals; (c) thence to this court on writ of certiorari.

3. Any error on the part of the Circuit Court of Appeals for the Fifth Circuit, as set forth in Paragraph 3, subdivision B of the petition is not in conflict with the decision of this court and other circuits, nor is such error in a final judgment or decree in said Circuit Court of Appeals from which a writ of certiorari should be allowed.

4. Writs of certiorari are not allowed from this court to the Circuit Court of Appeals in order to review an error therein, as set forth in Paragraph 4, subdivision B of the petition for the writ.

Taking these reasons up seriatim, and identifying them alphabetically to distinguish them from the numerical arrangement in the petition, we say:

(a) The case of Page Co. vs. McDonald, supra, was a writ of error to the District Court of the United States for the District of Massachusetts to review a judgment of that court abating an action brought to recover damages for the alleged publication of a libel. Mrs. McDonald had filed a suit,

in the state superior court of Massachusetts against the Page Co., and the complainant in her suit had made allegations which the Page Co., alleged were libelous. Thereupon the Page Co., in the District Court of the United States for the District of Massachusetts sued Mrs. McDonald for libel, and service was made upon her while in the district in attendance before a special master appointed by the superior court of Massachusetts to hear the evidence. She pleaded in abatement of the action that she was immune from service. The district court held that she was immune. This judgment was affirmed by the Supreme Court of the United States and the immunity granted was founded on the rule announced theretofore by the Supreme Court of the United States in **Stewart vs. Ramsey, 242 U. S. 128**, as follows:

> "It is founded, in the necessities of the judicial administration, and the courts, federal and state, have equal interest in those necessities. They are both instruments of judicial administration within the same territory available to suitors, fully available, neither they nor all their witnesses subject to be embarrassed or vexed while attending, the one for the protection of his rights, the others while attending to testify."

And further:

> "It is 'the privilege of the court' we have seen, rather than his. 'It is founded in the necessities of the judicial administration'."

Page Co. vs. McDonald, 261 U. S. 448.

It will, therefore, be seen that the decision of the Circuit Court of Appeals in this instance does not come in conflict in any way with the **Page Co. vs. McDonald** case.

The case of **Stewart vs. Ramsey, supra**, cited by counsel, was a case where Stewart brought an action at law

against Ramsey in the United States District Court for the Northern District of Illinois where summons was served on him personally. Ramsey pleaded in abatement that he was a resident of the State of Colorado. While in attendance upon the district court as a witness in the case where he was plaintiff, and that the process was served while he was returning from the court room after testifying. There was no question in the case as to summary remedy or as to any part of the corpus of the property before the court in the original case having been disturbed. The district court ruled that the defendant was immune, and the Supreme Court of the United States affirmed the judgment but notice that the affirmation was upon the grounds as follows:

> "The privilege which is asserted here is the privilege of the court, rather than the defendant. It is founded in the necessities of the judicial administration, which would be often embarrassed and sometimes interrupted if the suitor might be vexed with process while attending upon the court for the protection of his rights, and the witness while attending to testify. Witness would be chary of coming within our jurisdiction, and would be exposed to dangerous influences if they might be punished with a law suit for displeasing parties by their testimony; and even parties in interest, whether in the court or not, might be deterred from the rightfully, fearless assertion of a claim, or the rightfully, fearless assertion of a defense, if they are liable to be visited on the instant with litigation from the defeated party."

It will be seen from the above quotation that both the **Page Co** case and the **Stewart vs. Ramsey** case granted immunity to the defendant not because of any individual right of his, but because of the "necessities of the judicial administration."

The case of **Durst vs. Tautges et al, supra**, which was a case decided by the Circuit Court of Appeals for

the Seventh Circuit, was a case wherein Robt. McDonald, a member of the law firm, Tautges, Wilde and McDonald, had come into the State of Wisconsin for the purpose of taking depositions in a certain cause pending in the state courts of Minnesota, was served with injunctional order, and three separate actions commenced that day in the Circuit Court of Milwaukee, Wisconsin. McDonald, on behalf of his firm, moved to vacate the summons and the cause was removed upon petition to the District Court of the United States where the district court sustained the motion to vacate the service of the summons. The Circuit Court of Appeals in affirming this judgment held that the privilege was not a personal privilege, but a privilege of the court:

> "It is not simply a personal privilege, but it is also the privilege of the court, and is deemed necessary for the maintenance of its authoriay and in order to promote the due and efficient administration of justice."

Judge Dawkins, of the Circuit Court of Appeals, in his opinion (Rec. 169-175) had before him all of these decisions in the briefs of counsel, and in the last paragraph of his opinion distinguished the position of the petitioner in this case and his plea of immunity from the immunity granted in the other cases mentioned, in these words:

> "This immunity is more for the protection of the court itself, and to prevent interference with its proceedings than for the benefit of the attorneys."
>
> **Stewart vs. Ramsey, 242, U. S. 128.**
>
> "To allow and to defeat proper proceedings for the control of such property would be to destroy the very basis of the rule itself, i. e. the orderly functioning of the court."

The Circuit Court of Appeals had presented to it two rules of law; first, the well established rule of law:

"The court which first acquires the lawful jurisdiction of specific property by seizure thereof, or by the due commencing of a suit from which it appears that it is, or will become, necessary to a determination of the controversy involved, or in the inforcement of its judgment or decree therein, for the court to seize, to charge with a lien, or to exercise other like dominion over it, thereby withdraws that property from the jurisdiction of every other court so far as is necessary to accomplish the purpose of the suit, and entitles that court to retain the control of it requisite to effectuate its final judgment or decree therein, free from the interference of every other tribunal."

Long vs. Choctaw Oklahoma Co., 160 Fed. 355 (C. C. A. 8).

Illinois Steel Co. vs. Putnam, 68 Fed. 517 (C. C. A. 5)

Adams vs. Mercantile Trust Co., 66 Fed. 620 (C. C. A. 5) Corpus Juris, Vol. 34, Pg. 200.

Second, the well established rule of law:

"That a suitor, or witness, or attorney is exempt from service of process while without the jurisdiction of his residence for the purpose of attending court in an action to which he is a party, or in which he is to be sworn as a witness."

Page Co. vs. McDonald, 261 U. S. 446

Stewart vs. Ramsey, 242 U. S. 128

Durst vs. Tautges et al, 44 Fed. (2nd) 507.

These are two rules not necessarily conflicting and since both are rules established by all the decisions not for the protection of the individual, but for the pro-

tection of "the judicial necessities" they should never be allowed to conflict.

The decision of the Circuit Court of Appeals in this case, which held that where the two rules come in conflict in the same court the first rule quoted should be inforced to the exclusion of the second rule "because of the judicial necessities," which is not in conflict either with justice, equity, or the rules of decision established in this, or any other court.

On the motion to quash the service of process the allegations of the pleading are taken as true, and the evidence of the surrounding circumstances which were taken on the motion to quash were undisputed. Therefore the district court below as well as the Circuit Court of Appeals below had only the choice of enforcing one of the two important rules of law above set forth, both of which rules were a growth of decisions founded upon "judicial necessity," and to protect the jurisdiction of the courts. One rule to the effect that a "person" whether party, witness, or attorney, attending court proceedings must not be allowed to be withdrawn from the jurisdiction of the court. The other, that "property" likewise, in a sense, attending court must not be allowed to be withdrawn from such attendance. Both rules are flexible and are not conflicting when viewed from the basic reasonings upon which they are founded, and that one of the rules must prevail which best conserves the "judicial necessity," and best preserves the "jurisdiction of the court."

If the rule of exemption from service of non-resident parties, witnesses and attorneys attending court in a foreign jurisdiction was inflexible, we would be faced with the anomalous spectacle of each suitor in every case where claimed property was within the jurisdiction of the court, and in process of being seized thereby, hiring a non-resident attorney and handing such property over to him, thereby forcing the court to release jurisdiction thereof, and forcing the original complainant in the

case to go out of his local jurisdiction to the place of residence of the foreign attorney to settle the question of the validity of the transfer of property already constructively in the possession of the lower court.

Such a proposition is unthinkable, and a statement of it is its own refutation.

(b) If this writ of certiorari is not granted it is true that the petitioner will be required to stand trial in the district court on the merits, but he will not be deprived of his immuniy since he has still the remedy of an appeal from the district to the Circuit Court of Appeals, and by writ of certiorari thence to this court.

(c) The decision of the Circuit Court of Appeals below was from a judgment or decree of the district court rendered upon the hearing of all the evidence for the purpose of showing the surrounding circumstances, and there was no error on the part of the Circuit Court of Appeals to determine the issue on petitioner's immunity from service of process upon the consideration of the nature and merits of the surrounding circumstances upon which his immunity vel non was based.

(d) There was no error in the decision of the Circuit Court of Appeals herein, but if so, this court will not review the same on the writ of certiorari as here requested.

BRIEF AND ARGUMENT IN OPPOSITION TO THE GRANTING OF THE WRIT OF CERTIORARI

The writ of certiorari is asked here under and by virtue of **Section 347, Title 28, U. S. Code.** This section was **Judicial Code, Section 240,** amended February 13, 1925, to read as at present. Under Section 240 of the Judicial Code prior to the amendment of February 13, 1925, it was consistently held by this court:

1. That the jurisdiction to issue certiorari will be exercised sparingly and only in cases of peculiar gravity and general importance:

Lau Ow Bew, 141 U. S. 583

Lau Ow Bew vs. U. S., 144 U. S. 47

American Construction Company vs. Jacksonville Railroad Company, 148 U. S. 372

Forsyth vs. Hammond, 166 U. S. 506

Hamilton Brown Shoe Co., vs. Wolf, 240 U. S. 251

Houston Oil Co., vs. Goodrich 245 U. S. 440.

We judge from the remarks of Mr. Justice McReynolds in the case of **Furness-Withy vs. Yang-Tsze Ins. Asso.**, that under the statute as it then stood (Oct. 1916) hundreds of additional cases were being taken to the Supreme Court by certiorari, and that, therefore, it was necessary to give them the closest attention and to allow the writ only when absolutely necessary.

Furness-Withy & Co. vs. Yang-Tsze Ins. Asso., 242 U. S. 430.

In fact it has been held that certiorari will not be granted where there is any other remedy, and since in the present case this petitioner has the remedy of going back to the district court and having his case tried on the merits and then appealing to the Circuit Court of Appeals before asking for the writ of certiorari, his remedy is plain and adequate.

In re Tampa Suburban R. R. Co., 168 U. S. 583.

In re Huguley Mfg. Co., 184 U. S. 297.

This court has consistently held that while the writ of certiorari is discretionary it is only granted upon extraordinary reasons and is often denied when the power to issue is unquestioned.

Hyde vs. Shine, 199 U. S. 62

Re Hitz 111, U. S. 166

American Const. Co. vs. Jacksonville, Etc., Co., 148 U. S. 372.

Mr. Chief Justice Taft said in the case of **Magnum Import Company vs. Coty:**

> "The question how the court should exercise this power next arises. The jurisdiction to bring up cases by certiorari from the Circuit Court of Appeals was given for two purposes; first, to secure uniformity of decisions between those courts in the nine circuits, and, second, to bring up cases involving questions of importance which it is to the public interest to have decided by this court of last resort. The jurisdiction was not conferred on this court merely to give the defeated party in the Circuit Court of Appeals another hearing. Our experience shows that 80 per cent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ."

Magnum Import Co., vs. Coty, 262 U. S. 159.

The true rule is that even though the writ be granted to the Circuit Court of Appeals such cases will not be reversed on certiorari unless it amounts to a miscarriage of justice.

2. Justice Taft held that this court would not entertain requests for certiorari of an ordinary patent case unless it be necessary to reconcile decisions of the Circuit Court of Appeals on the same patent.

The petitioner herein seems to think that this court will issue the writ of certiorari to review the Circuit Court of Appeals decision because in the opinion of petitioner that decision conflicts in principle with certain decisions of circuit courts of appeals in other cases not related to the present. We do not understand this to be the rule.

Mr. Chief Justice Taft said in the **Keller vs. Adams** case, **supra:**

> "Such an ordinary patent case, with its issues of inventions, breadth of claims, and non-infringement, this court will not bring here by certiorari unless it be necessary to reconcile decisions of the Circuit Court of Appeals on the same patent. We, therefore, find ourselves mistaken in assuming that an important issue of general patent law, under Section 4916, Rev. Stat. (Comp. Stat. Sec. 9461, 7 Fed Stat. Anno. 2nd, Ed. P. 211) is here involved. The result is that an order must be entered dismissing the writ of certiorari as improvidently granted at the cost of the petitioner. Layne & B. Corp. vs. Western Well Works, 261 U. S. 387, 67 L. Ed. 712, 43 Sup. Ct. Rep. 422; Furness W. & Co. vs. Yang-Tsze Ins. Asso., 242 U. S. 430, 61 L. Ed. 409, 37 Sup. Ct. Rep. 141; United States vs. Rimer, 220 U. S. 547, 55 L. Ed. 578, 31 Sup. Ct., Rep. 596; Keller vs. Adams, 264 U. S. 314."

3. If upon examination of such a case there is no real conflict of such decision the petition will be dismissed.

Layne & B. Corporation vs. Western Well Works, Inc., 261 U. S. 387.

In the **Layne & Bowler** case, **supra**, the Chief Justice also remarked that since there was no conflict in the deci-

sions of the Circuit Courts of Appeals on the same patent, the writ of certiorari in that case would be dismissed stating:

> "If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on its merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of **importance to the public** as distinguished from **that of the parties** and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal. The present case certainly comes under neither head."

4. Certiorari will not be granted where there is any other remedy.

In Re Tampa Sub. R. R. Co., 168 U. S. 583.

5. That the judgment of the Circuit Court of Appeals of which certiorari is asked must be final.

Geo. A. Fuller Co. vs. Otis Elevator Co. 245 U. S. 489.

In the **Fuller** case, **supra,** Mr. Justice Holmes delivered the opinion in the case and held:

> "It is objected to the writ of certiorari in this case that there was no final judgment; but the writ when issued to the court of appeals is not limited to cases in which final judgment has been entered, but only to cases in which the judgment when entered is final."

Of course, the judgment from which the writ of certiorari was asked in the **Fuller** case was under **Judicial Code 251** which has now been repealed but the words quoted by Justice Holmes as follows:

"With the same power and authority in the case as if it had been carried by writ of error on appeal to said Supreme Court."

which are still substantially a part of **Sec. 347, Title 28, U. S. Code** under which the present writ of certiorari is requested as follows:

"With like effect as if the cause had been brought there by unrestricted writ of error or appeal."

We take it that the last quoted words in **Section 347, Title 28, U. S. Code,** mean just what Justice Holmes said, namely, that while the power is given to issue a writ of certiorari, to Circuit Court of Appeals directing it to send up the record in a case, either before or after a judgment or decree by such lower court, but that when the record is sent up after a judgment granted by the Circuit Court of Appeals it must be on one which was final.

Denver vs. New York Trust Co., 229, U. S. 123.

6. That the passage of **Section 347 Title 28, U. S. Code An.,** which is the amendment of **Section 240, Judicial Code** by act February 13, 1925, 43 **Statutes at Large 938,** did not change the grounds or causes for the issuance of writs of certiorari, or make writs of certiorari procurable under any less extraordinary circumstances is evident from the fact that this court in the revision of its rules adopted June 5, 1928, effective July 1, 1928, more than three years after the amendment of February 13, 1925, aforesaid, did not change that part of former Rule 35 contained in Paragraph 5 thereof, which provides that "a review on writ of certiorari is not a matter of right but of sound judicial discretion, and will be granted only where there are special and important reasons therefor." And then continues to give the rules generally used in measuring the court's discretion. (Reference is here made to the rule of this court No. 38).

7. It is recognized, of course, that the Supreme Court of the United States also has the right to issue writ of certiorari in cases not provided for by Section 347, Title 28, U. S. Code, under the provisions of the other Section 377, Title 28, U. S. Code, Anno., but since the latter is rather a provision extraordinary and for the issuance of writs not specifically provided for by statute, we judge that the reasons herein given for not issuing the writ under Section 347, Title 28, U. S. Code, would apply with a greater force to requests to issue the writ under Section 377, Title 28, U. S. Code.

SUMMARY

The petitioner herein has no right to the writ of certiorari (a) because the decision of the court below is not in conflict with either the decision of this court, or any other circuit; (b) because the matters involved are not of general importance; (c) because the decision from which certiorari is asked has been entered by the Fifth Circuit Court of Appeals, and was not a final decision; (d) because the decision in the Circuit Court of Appeals was correct.

It is, therefore, respectfully submitted that the writ of certiorari herein prayed for should be denied.

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